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# State v. Pierce Appellant's Brief Dckt. 44317

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44317
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR 2014-18689
v.	)	
	)	
JEFFREY CHARLES PIERCE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, forty-nine-year-old Jeffrey Charles Pierce pleaded guilty to felony possession of a controlled substance. The district court imposed a unified sentence of seven years, with three years fixed. On appeal, Mr. Pierce asserts the district court abused its discretion when it ordered his sentence into execution rather than retain jurisdiction.

Statement of Facts and Course of Proceedings

Boise Police Department officers pulled over a car after seeing it fail to come to a complete stop before exiting a parking lot and make lane changes without signaling for

five seconds or 100 feet. (Presentence Report (*hereinafter*, PSI), p.72.)<sup>1</sup> Mr. Pierce was in physical control of the car, and Ada County dispatch confirmed he had a suspended driver's license. (PSI, p.72.) The officers arrested Mr. Pierce for driving without privileges. (PSI, p.72.) The officers searched Mr. Pierce incident to the arrest, and found a glass pipe on his person. (PSI, p.72.) The pipe contained approximately 0.1 grams of suspected methamphetamine that tested presumptively positive. (PSI, p.72.) Officers also deployed a K-9 unit to the traffic stop, and the drug dog alerted on the car. (PSI, p.72.) Officers then searched the car and found a gram of suspected marijuana that tested presumptively positive, as well as a copper pipe with burnt marijuana residue. (PSI, p.72.)

The State charged Mr. Pierce by Information with one count of possession of a controlled substance, felony, I.C. § 37-2732(c), one count of possession of a controlled substance, misdemeanor, I.C. § 37-2732(c), and one count of possession of drug paraphernalia, misdemeanor, I.C. § 37-2734A. (R., pp.75-76.) Mr. Pierce entered a not guilty plea. (R., p.86.)

Mr. Pierce filed a motion to suppress, which the district court denied after conducting a hearing. (R., pp.87-88, 107-11; see R., pp.103-05.) The State later filed an Information Part II charging Mr. Pierce with a persistent violator sentencing enhancement under I.C. § 19-2514. (R., pp.146-47.)

Pursuant to a plea agreement, Mr. Pierce agreed to plead guilty to the felony possession of a controlled substance count. (R., p.154; Tr., p.6, Ls.12-18.) The State

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<sup>1</sup> The presentence report considered by the district court in this case was prepared for another of Mr. Pierce's cases, Payette County No. CR 2015-1793 (*hereinafter*, the Payette County case). (See Tr., p.20, Ls.14-17; PSI, p.1.)

agreed to dismiss the remaining counts, and would recommend the district court impose a unified sentence of seven years, with two years fixed, and that the district court retain jurisdiction. (Tr., p.6, Ls.19-22.) Mr. Pierce would be free to argue for a lesser sentence. (See Tr., p.7, Ls.3-4.) The district court accepted Mr. Pierce's guilty plea. (R., p.154; Tr., p.17, Ls.11-14.)

At the sentencing hearing, the State recommended the district court impose a unified sentence of seven years, with two years fixed, and that the district court retain jurisdiction. (Tr., p.21, Ls.13-16.) Mr. Pierce also recommended the district court retain jurisdiction. (Tr., p.28, Ls.12-23.) However, the district court went beyond the recommendations of the parties and imposed a unified sentence of seven years, with three years fixed, without retaining jurisdiction. (R., pp.161-64; Tr., p.32, Ls.14-23.)

Mr. Pierce filed a Motion for Reconsideration of Sentence and for Leave, pursuant to Idaho Criminal Rule 35 ("Rule 35"). (R., p.166.) The district court issued an Order Denying Motion to Reconsider Sentence Pursuant to Idaho Criminal Rule 35. (R., pp.172-74.) On appeal, Mr. Pierce does not challenge the district court's denial of his Rule 35 motion.<sup>2</sup>

Mr. Pierce also filed a Notice of Appeal timely from the district court's Judgment of Conviction and Commitment. (R., pp.167-69.)

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<sup>2</sup> The Idaho Supreme Court has held that "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203 (2007). "An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information." *Id.*

## ISSUE

Did the district court abuse its discretion when it ordered Mr. Pierce's sentence into execution rather than retain jurisdiction?

## ARGUMENT

### The District Court Abused Its Discretion When It Ordered Mr. Pierce's Sentence Into Execution Rather Than Retain Jurisdiction

Mr. Pierce asserts that the district court abused its discretion when it ordered his sentence into execution, rather than retain jurisdiction, because there is insufficient information in the record to determine that a suspended sentence and probation would be inappropriate. The district court should have instead followed the recommendation of the parties by placing Mr. Pierce on a period of retained jurisdiction.

As the Idaho Court of Appeals has explained, retained jurisdiction is designed "to allow the trial court additional time to evaluate the defendant's rehabilitation potential and suitability for probation." *State v. Chapel*, 107 Idaho 193, 194 (Ct. App. 1984). "Probation is the ultimate objective sought by a defendant who asks a court to retain jurisdiction." *Id.* (citing *State v. Toohill*, 103 Idaho 565, 567 (Ct. App. 1982)). Whether to place a defendant on probation is a choice "committed to the sound discretion of the trial court." *Id.* Because probation is at issue, the standard of review for a district court decision on whether to retain jurisdiction is the "clear abuse of discretion" standard, with a focus on the criteria set forth in I.C. § 19-2521. *Id.* "Refusal to retain jurisdiction will not be deemed a 'clear abuse of discretion' if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under I.C. § 19-2521." *Id.*

Section 19-2521 provides that a sentencing court

shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

(a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) A lesser sentence will depreciate the seriousness of the defendant's crime; or

(d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or

(e) Imprisonment will provide an appropriate deterrent for other persons in the community; or

(f) The defendant is a multiple offender or professional criminal.

I.C. § 19-2521(1). Additionally, while not controlling the discretion of the court, the following grounds

shall be accorded weight in favor of avoiding a sentence of imprisonment:

(a) The defendant's criminal conduct neither caused nor threatened harm;

(b) The defendant did not contemplate that his criminal conduct would cause or threaten harm;

(c) The defendant acted under a strong provocation;

(d) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) The victim of the defendant's criminal conduct induced or facilitated the commission of the crime;

(f) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained; provided, however, nothing in this section shall prevent the appropriate use of imprisonment and restitution in combination;

(g) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) The defendant's criminal conduct was the result of circumstances unlikely to recur; [and]

(i) The character and attitudes of the defendant indicate that the commission of another crime is unlikely.

I.C. § 19-2521(2).

Here, Mr. Pierce submits there is insufficient information in the record to determine that a suspended sentence and probation would be inappropriate. Mr. Pierce relapsed into substance abuse following the death of his father. In the Presentence Investigation Questionnaire for the Payette County case, Mr. Pierce explained, "I lost my father Last Year and my Way of dealing with this has been drugs, I was clean for 4 1/2 yrs, I got Loaded Again on Meth Again and was not able to stop using." (PSI, p.5.) Regarding his social history, Mr. Pierce stated, "I got clean and moved down here to start a business with my dad to try and have a relationship with him. Always had that void I wanted to fill He died I used drugs again to kill the pain started hanging with those kinds of people again, led me right back to jail." (PSI, p.22.)

Similarly, at the sentencing hearing, Mr. Pierce told the district court, "I was clean and sober, moved down here and started a business with my father. And my dad died. And I made some bad choices. And I got loaded again. But, I mean, I was living here for almost five years with not even a speeding ticket. And I was clean and sober." (Tr., p.29, L.21 – p.30, L.2.) That was despite Mr. Pierce's extensive prior criminal record (see PSI, pp.5-21); he reported that "since I got out prison in 2010, you know, I successfully completed my parole in 13 months." (Tr., p.29, Ls.18-20.)

Mr. Pierce now desires to get treatment for his substance abuse problems. During the presentence investigation, Mr. Pierce stated, “I need to get the tools to help me stay clean, I’m clean now and my mind is back to thinking straight.” (PSI, p.27.) At the sentencing hearing, Mr. Pierce informed the district court, “I’m doing everything I can now to find the help I need and to get some tools to help me stay away from the drugs in case anything—you know, when things happen, I don’t end up in that direction again.” (Tr., p.30, Ls.20-24.) He further stated, “when I get out of this mess, I’m going to do whatever I can to get the help I need to stay clean and sober, so I don’t have to be back here again.” (Tr., p.31, Ls.2-6.)

Additionally, Mr. Pierce has the support of his fiancée, Wendy Johnson, in leading a law-abiding life. Mr. Pierce stated during the presentence investigation that he and Ms. Johnson planned to marry and spend their life together. (PSI, p.23.) With respect to his plans for recovery, he stated Ms. Johnson “is behind me, now just need to get this behind me, find a program in this state I can afford and do it.” (PSI, p.27.) Ms. Johnson told the presentence investigator Mr. Pierce would be welcome to live with her upon his release, stating, “He belongs at home, with me.” (PSI, p.23.) Based on phone conversations with Ms. Johnson, Mr. Pierce’s defense counsel told the district court “[s]he seems to be a pretty steady person who is generally concerned about him. Well, I know she is very concerned about him because she has called me quite frequently.” (Tr., p.26, L.21 – p.27, L.2.) Defense counsel thought Mr. Pierce “wants to live a peaceful, tranquil life out in Payette with his fiancée. He’s tired of this. Again, I think he’s sincerely tired of this mess of a life that he has been living. (Tr., p.27, Ls.21 25.)



The above factors indicate there is insufficient information in the record to determine that a suspended sentence and probation would be inappropriate. That Mr. Pierce's relapse into substance abuse occurred after the death of his father suggests his criminal conduct was the result of circumstances unlikely to recur. See I.C. § 19-2521(2)(h). His desire to get treatment for his substance abuse problems, and the support of his fiancée in living a law-abiding life, evince that Mr. Pierce's character and attitudes indicate that the commission of another crime is unlikely. See I.C. § 19-2521(2)(i). Thus, Mr. Pierce submits that the district court abused its discretion when it ordered his sentence into execution, rather than retain jurisdiction.

#### CONCLUSION

For the above reasons, Mr. Pierce respectfully requests that this Court reverse the district court's order revoking probation and remand his case to the district court for the entry of an order placing him on a period of retained jurisdiction.

DATED this 18<sup>th</sup> day of October, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18<sup>th</sup> day of October, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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\_\_\_\_\_/s/\_\_\_\_\_  
MARY ANN LARA  
Administrative Assistant

BPM/mal